United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

REVISED

DATE: April 19, 2016

S.A.M.

TO: Allen Binstock, Regional Director
Region 8

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: BFG Federal Credit Union
Case 08-CA-151936

Dubuque Chron
530-6050-4500
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The Region submitted this case for advice as to: (1) whether the Employer's decision to close one of its three branches, with corresponding layoffs and a reassignment of unit work, was a mandatory subject of bargaining under either *Dubuque Packing Co.*[1] or *Holmes & Narver*[2]; (2) whether the Employer unlawfully failed to provide the Union with a National Credit Union Administration ("NCUA") report that the Employer claimed it was prohibited from disclosing by NCUA regulations; and (3) whether this case presents an appropriate vehicle to urge the Board to adopt Member Liebman's concurring opinion in *Embarq Corp.,*[3] which proposed modifying the duty to provide information in the *Dubuque* context. We conclude that the Employer's decision to close one of its branches is properly analyzed under *Dubuque* and that the decision is a mandatory subject of bargaining, that the Employer unlawfully failed to bargain toward an accommodation to disclose information from the NCUA report, and that this case presents an appropriate vehicle to urge the Board to adopt Member Liebman's concurring opinion in *Embarq*.

FACTS

BFG Federal Credit Union (the "Employer") is a non-profit financial institution that offers a wide range of financial and banking services. It is headquartered in Akron, Ohio and has branches in Hudson and Twinsburg, Ohio. The Office and

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[1] 303 NLRB 386 (1991), *enforced sub nom. Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993).

[2] 309 NLRB 146 (1992).

[3] 356 NLRB 982, 983-84 (2011).

Professional Employees Union, Local 1794 (the "Union") began organizing the Employer in October 2014. In response, the Employer mounted a vigorous anti-Union campaign.[4] In the midst of the Union's organizing campaign, the NCUA—a federal agency that monitors the Employer—completed an examination of the Employer's operations and issued a report requiring the Employer to reduce its expenses and generate a profit by the end of 2015. The Employer had generated a net income of $100,216 in 2012, but sustained net losses of $765,133 in 2013 and $746,674 in 2014. In particular, the report instructed the Employer to perform a "branch analysis" to assess the volume of transactions, loan activity, etc., at its three locations, which might help "identify opportunities for reducing hours or number of employees." According to an NCUA official, failure to abide by the report's recommendations would lead to a warning letter; in turn, failure to heed the warning letter would lead to a cease and desist letter. The NCUA official noted that enforcement actions are comparatively rare, and that the NCUA typically only fines a credit union if it violates a statute or fails to turn in a quarterly operating report.

A majority of the employees voted in favor of the Union during a Board election held on January 20, 2015,[5] and the Union was certified on January 29. On January 27 the Employer held a board meeting regarding the NCUA report's findings. According to the redacted minutes of the meeting, the board discussed the possibility of closing branches and reducing healthcare and pension benefits. At the Employer's next board meeting on February 17, the board voted to close the Twinsburg branch.

The parties met for their first bargaining session on April 2, at which the Employer informed the Union of its decision to close the Twinsburg branch and consolidate those operations at its Hudson branch. In addition, the Employer identified eight unit employees it intended to lay off as a result of the consolidation. None of those employees were employed at Twinsburg. The Employer explained that it had lost nearly (b) (4) in 2014 and that the branch closure and layoffs were due to the NCUA report. By letter dated April 10, the Union requested, *inter alia*, a copy

[4] The Region has determined that the Employer has committed numerous other violations during the course of the Union's organizing campaign and subsequent bargaining. Specifically, the Region determined that the Employer violated Sections 8(a)(1), (3), and (5) by: interrogating employees, threatening employees with the loss of their benefits, disparaging the Union, making coercive statements, maintaining overly broad rules, disciplining and selecting employees for layoff in retaliation for union activities, freezing employees' pensions, unilaterally discontinuing awards, refusing to meet and confer at reasonable times, and engaging in other tactics aimed at frustrating negotiations.

[5] All remaining dates are in 2015, unless otherwise noted.

of the NCUA report. The Employer responded that the decision to close the Twinsburg branch was not a mandatory subject of bargaining and therefore that the Union was not entitled to documents pertaining to it.

At the parties' April 16 bargaining session, the Union proposed a confidentiality agreement for disclosure of the NCUA report. The Employer replied that it would consider it, but reiterated that it was not required to bargain over the decision to close the Twinsburg branch inasmuch as the Employer was facing an "exigency." The Employer explained that Twinsburg was the best branch to close because the Hudson branch was newer, had safety deposit boxes, and had a three-lane drive up, and because the Employer could write more off for tax purposes on the Hudson branch. According to a branch analysis that the Employer showed the Union, the Employer could write off approximately (b) (4) for the Hudson branch versus only (b) (4) for the Twinsburg branch. The branch analysis also indicated that the Hudson branch annually cost (b) (4) to run, of which (b) (4) was salary and benefits, while the Twinsburg branch cost (b) (4) to run, of which (b) (4) was salary and benefits.

The Employer went ahead with the proposed layoffs on April 17. On April 18, the Employer sent an email to an NCUA examiner stating that the Employer was now unionized, that the Union was requesting a copy of the most recent NCUA report, and requesting that the NCUA provide the Employer with proof that the Employer was not permitted to release the report. The NCUA examiner responded with generic information about Freedom of Information Act ("FOIA") requests and exemptions. On May 11, the Employer informed the Union that the NCUA had instructed the Employer to not provide the NCUA report, and that any Union request should be made pursuant to FOIA; however, the Employer stated that any such FOIA request was likely to be denied. On May 30, the Employer ultimately closed the Twinsburg branch and transferred all work performed at Twinsburg to the Hudson branch. On January 27, 2016, in response to an inquiry from the Region, an NCUA official stated that she had no record of an Employer request for the NCUA report.

ACTION

We conclude that the Employer's decision to close its Twinsburg facility is properly analyzed under *Dubuque* rather than under *Holmes & Narver*, that the decision is a mandatory subject of bargaining, that the Employer unlawfully failed to bargain over an accommodation to disclose the contents of the NCUA report, and that this case presents an appropriate vehicle to urge the Board to adopt Member Liebman's concurring opinion in *Embarq*, which proposed modifying the duty to provide information in the *Dubuque* context.

The Employer's decision to close its Twinsburg facility was a mandatory subject of bargaining under *Dubuque Packing Co.*

In *Fibreboard Paper Products v. NLRB*, the Supreme Court held than an employer's subcontracting of bargaining unit work, in such a way that it merely replaced existing employees with those of an independent contractor who did the same work under similar conditions of employment, was a mandatory subject of bargaining.[6] The Court stated that, since the decision to subcontract and replace existing employees with those of an independent contractor involved no capital investment and had not altered the company's basic operation, requiring the company to bargain about the decision "would not significantly abridge the company's freedom to manage the business."[7] Moreover, because the decision turned on labor costs, it was "peculiarly suitable for resolution within the collective-bargaining framework . . . ."[8]

Nearly two decades later, the Supreme Court issued its decision in *First National Maintenance v. NLRB*, which not only reaffirmed the Court's earlier holding in *Fibreboard*, but also determined that an employer lawfully refused to bargain over a decision to close part of its business for purely economic reasons unrelated to labor costs.[9] In reaching this conclusion, the Court also noted that "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business . . . ." and that "bargaining over management decisions that have a substantial impact on the *continued availability of employment* should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."[10] The Court also noted that it had implicitly engaged in such an analysis in *Fibreboard*.[11]

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[6] 379 U.S. 203, 213 (1964).

[7] *Id.*

[8] *Id.* at 214.

[9] 452 U.S. 666 (1981).

[10] 452 U.S. at 678-79 (emphasis added).

[11] *Id.* at 679-80.

In *Dubuque*, the Board established a test for applying the Supreme Court's *First National Maintenance* analysis to plant relocation decisions.[12] Under this test, the General Counsel establishes a prima facie case that the employer's relocation decision was a mandatory subject of bargaining by showing that the decision was "unaccompanied by a basic change in the nature of the employer's operation."[13] The employer can rebut the General Counsel's prima facie case by establishing that the work performed at the new location "varies significantly from the work performed at the former plant," that the work performed at the former plant will be "discontinued entirely," or that the employer's decision involves a "change in the scope and direction" of its enterprise.[14] Alternatively, the employer may rebut the General Counsel's prima facie case by demonstrating that labor costs were not a factor in the decision or, even if labor costs were a factor, that the union could not have offered labor cost concessions sufficient to change the employer's decision to relocate.[15]

In *Holmes & Narver*, the Board found that an Army subcontractor unlawfully failed to bargain over its decision to consolidate three of its divisions into two divisions and lay off nine employees, but did not apply the *Dubuque* test.[16] The Board explained that the *Dubuque* analysis was meant to apply to plant relocations, which potentially involve complex capital decisions, rather than to a simple consolidation of jobs and resultant layoffs, which is a traditional mandatory subject of bargaining.[17] The Board expanded the holding of *Holmes & Narver* in *Westinghouse Electric Corp.* to find that an employer had unlawfully failed to bargain over its decision to close one building at its facility, lay off four employees, and transfer the work to a different building on the same premises.[18] The Board explained that, similar to the employer in *Holmes & Narver*, the employer in *Westinghouse* was simply seeking to continue

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[12] 303 NLRB at 391-93.

[13] *Id.* at 391.

[14] *Id.*

[15] *Id.*

[16] 309 NLRB at 146.

[17] *Id.* at 147 (citing *Cincinnati Enquirer*, 279 NLRB 1023, 1031-32 (1986) (transfer of job duties to nonunit employee, which resulted in elimination of unit position, is a mandatory subject of bargaining)).

[18] 313 NLRB 452 (1993), *enforced*, 46 F.3d 1126 (4th Cir. 1995), *cert. denied*, 514 U.S. 1037 (1995).

the same work with fewer employees.[19] The Board rejected the *Dubuque* multi-step approach because the case involved "essentially one plant, albeit [with] operations . . . located in several different buildings . . . ."[20] Simply shifting work from one group of employees to another in a different building on the same premises was not the "type of relocation" properly encompassed by the *Dubuque* analysis.[21]

Here, the Employer's decision to close the Twinsburg branch is properly analyzed under *Dubuque*. Although the Employer is not planning on investing capital in a new facility to house the relocated work, its decision nonetheless involved the type of capital decision that is properly analyzed under *Dubuque* rather than *Holmes & Narver*.[22] Indeed, the Employer was influenced by the fact that it could write off nearly (b) (4) on the Hudson facility versus only (b) (4) on the Twinsburg facility, and by the fact that the Hudson facility was newer and had safety deposit boxes and a three-lane drive up. And, unlike *Westinghouse* and *Solutia*, in which the Board declined to apply the *Dubuque* test because the employers shifted unit work between existing buildings on the same premises, the Employer here closed a facility and relocated work to an existing facility in a different geographical location.[23] The Employer's action was not akin to shifting work within what was essentially a single plant; rather, it was a laborious process that involved transferring customers' accounts and notifying the affected customers (with the concomitant risk of customer alienation), alongside the aforementioned capital considerations.

Applying the *Dubuque* analysis, we conclude that the Employer unlawfully failed to bargain with the Union over its decision to close the Twinsburg facility. First, there has been no basic change in the nature of the Employer's operation. Following the closure, the Employer has continued to provide the same services to the same account

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[19] *Id.* at 453.

[20] *Id.*

[21] *Id. See also Solutia, Inc.*, 357 NLRB 58, 63-64 (2011) (employer's decision to close one chemical-testing facility at its premises and consolidate that work into another facility at the same premises is a mandatory subject of bargaining without regard to *Dubuque* multi-step analysis), *enforced*, 699 F.3d 50 (1st Cir. 2012).

[22] *See Embarq Corp.*, 356 NLRB at 982 (applying *Dubuque* test to evaluate whether employer unlawfully refused to bargain over decision to close Las Vegas call center and streamline operations by consolidating all work into existing Florida call center; employer's decision did not involve facility construction).

[23] *Embarq Corp.*, 356 NLRB at 982.

holders, but with fewer employees and from one less location.[24] In addition, labor costs were plainly a factor in the Employer's decision; thus, the branch analysis provided by the Employer to the Union indicated that approximately three-quarters of the operating expenses at both the Hudson and Twinsburg branches were chargeable to salary and benefits. Further, the Employer has not argued that the Union could not have made labor-cost concessions sufficient to offset the Employer's savings.[25] Accordingly, we conclude that the Employer's failure to bargain over the relocation decision violated Section 8(a)(5).[26]

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[24] *See id.* (employer continued to provide same customer service and employees performed work in the same manner, but from one less location).

[25] We note that it would be difficult to make such an assessment at this juncture because it is unclear how much the Employer saved by this closure. Though the Employer's branch analysis indicates that the Twinsburg branch annually costs (b) (4) in benefits and salary, none of the Twinsburg employees were actually laid off. Instead, eight employees from the other two branches were laid off. (b) (5) [redacted]

[26] We additionally note that, inasmuch as the Employer argues that a financial "exigency" relieved it from bargaining over the decision to close the Twinsburg branch, neither the "greater" exigency outlined in *Bottom Line Enterprises*, 302 NLRB 373 (1991), *enforced*, 15 F.3d 1087 (9th Cir. 1994), nor the "lesser" exigency discussed in *RBE Electronics of S.D.*, 320 NLRB 80 (1995), would have excused the Employer's failure to bargain. Thus, in order to qualify for the "greater" exigency that excuses an employer's complete failure to bargain over a unilateral change, the economic event giving rise to the exigency must be an extraordinary, unforeseen event having a major economic impact and which requires immediate action. *See Port Printing AD & Specialties*, 351 NLRB 1269, 1270 (2007), *enforced*, 589 F.3d 812 (5th Cir. 2009). An example of such an exigency is a hurricane which forced an employer to evacuate its facility and temporarily lay off employees. *See id.* Here, NCUA did not require closure of a branch, but rather that the Employer come up with some way of lowering costs, and the prospect of gradually escalating NCUA warnings accompanied by fines should the Employer not quickly secure cost savings does not rise to the high exigency level. Moreover, the "lesser" exigency discussed in *RBE Electronics* permits an employer to make a unilateral change during contract bargaining *only if* the employer provides notice and an opportunity to bargain to the union and the union either waives its right to bargain or the parties reach impasse over the specific matter proposed for

The Employer unlawfully failed to bargain over an accommodation to disclose the information contained in the NCUA report

A union is generally entitled to information pertaining to the performance of its collective-bargaining responsibilities.[27] However, an employer may assert a legitimate confidentiality interest that outweighs the union's need for the information.[28] Even when an employer asserts a legitimate confidentiality interest in relevant information, however, the employer must bargain toward an accommodation between the union's information needs and the employer's justified confidentiality interests.[29] The Board has found that such an accommodation can take the form of a confidentiality agreement or a protective order that will "permit the disclosure of the needed information subject to safeguards negotiated by the parties to ensure its proper use."[30] Moreover, the Board has held that a law prohibiting the disclosure of relevant information does not relieve an employer of its duty under Section 8(a)(5) to bargain towards an accommodation with the union.[31] Thus, in *Borgess Medical Center*, an employee was discharged for giving the wrong medication to a patient, which caused temporary paralysis, and then attempting to cover up his mistake.[32] The employee grieved his discharge and, in preparation for arbitration, the union requested incident reports concerning other medication errors.[33] State law, however,

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change. *RBE Electronics*, 320 NLRB at 82. Here, the Employer steadfastly refused to bargain over its decision, and so the "lesser" exigency would likewise not excuse the Employer's unilateral decision.

[27] *See NLRB v. ACME Indus. Co.*, 385 U.S. 432, 435-36 (1967).

[28] *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318 (1979).

[29] *Pennsylvania Power Co.*, 301 NLRB 1104, 1105-06 (1991); *see id.* at 1107-08 (where nuclear power company had strong interest in preserving anonymity of employee informants whose statements led to some employees being drug-tested and disciplined, union nevertheless was entitled to summary of informants' statements that avoided identifying information).

[30] *Exxon Co. USA*, 321 NLRB 896, 899 (1996), *aff'd mem.*, 116 F.3d 1476 (5th Cir. 1997).

[31] *Borgess Medical Center*, 342 NLRB 1105 (2004).

[32] *Id.* at 1105.

[33] *Id.*

prohibited hospitals from disclosing "self-review" documentation.[34] Although the Board recognized the important public policies behind the state law and the hospital's resulting legitimate confidentiality interest in the information, the Board held that the hospital nevertheless unlawfully failed to bargain towards an accommodation for a conditional disclosure.[35]

Here, the NCUA report is clearly relevant to the Union's collective-bargaining duties, given that the Employer is relying on the report to justify closing the Twinsburg facility and implement layoffs. However, the Employer has asserted a legitimate confidentiality interest in the NCUA report, inasmuch as NCUA regulations prohibit the report's disclosure. Nevertheless, similar to the hospital in *Borgess Medical Center*, the Employer has unlawfully failed to bargain towards an accommodation that would seek to satisfy the Union's need for information while protecting the confidentiality of the NCUA report. Thus, although the Employer told the Union that it would "consider" the Union's proposed confidentiality agreement, the Employer did not follow through.[36] The Employer neither asked NCUA to release the report nor inquired about conveying the report's contents to the Union under a confidentiality agreement or other procedure; rather, the Employer assumed it was prohibited from disclosing the report to the Union and simply asked for proof that it was forbidden to do so. Tellingly, the NCUA official contacted by the Region had no record of an Employer request to provide the report to the Union.

Moreover, it is far from certain that the NCUA would have precluded the Employer from conditionally disclosing the report to the Union. The NCUA's own regulations allow NCUA examination reports to be disclosed—through a confidentiality agreement or a protective order—in legal proceedings, and offers a mechanism to do so.[37] Although not a "legal proceeding,"[38] collective bargaining

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[34] *Id.*

[35] *Id.* at 1106.

[36] We note that "[t]he burden of formulating a reasonable accommodation is on the employer; the union need not propose a precise alternative to providing the requested information unedited." *Borgess Medical Center*, 342 NLRB at 1106.

[37] 12 C.F.R. §§ 792.41-42 (providing that NCUA nonpublic records may be requested for purposes of legal proceedings if the requesting party submits a written request to the NCUA General Counsel); 12 C.F.R. §792.48(a) (providing that the NCUA General Counsel may impose restrictions on the disclosure of nonpublic documents, such as a protective order or confidentiality agreement that limits access to and any further disclosure of the nonpublic records).

imposes a legal requirement on employers through Section 8(a)(5) to disclose relevant information or, when legitimately confidential information is concerned, bargain toward an accommodation between the union's information needs and the employer's justified confidentiality interests. Had the Employer actually submitted a written request for the report to the NCUA General Counsel, it is entirely possible that the NCUA General Counsel would have permitted the Employer to disclose the report to the Union pursuant to a mutually acceptable confidentiality agreement. Because the Employer did not make that request, and did not offer any other reasonable accommodation that would provide the Union with the substance of the information in the report, it failed in its obligation under Section 8(a)(5) to bargain over an accommodation.

The instant case presents an appropriate vehicle to urge the Board to adopt Member Liebman's concurring opinion in *Embarq Corp.*

In *Embarq Corp.*, Member Liebman, concurring, recommended that in future *Dubuque* cases employers be required to provide unions with information about relocation decisions whenever there is a reasonable likelihood that labor-cost concessions might affect the decision.[39] She noted that the *Dubuque Packing* Board observed that an employer would enhance its chances of establishing that labor-cost concessions could not have altered its relocation decision "by describing the reasons for relocating to the union, fully explaining the underlying cost or benefit considerations, and asking whether the union could offer labor cost reductions that would enable the employer to meet its profit objectives."[40] She observed that such information "will often be necessary for the union to bargain intelligently[,]"[41] yet, anomalously, under existing law a union is not entitled to such information if the Board determines in hindsight that the union could not have made sufficient concessions to change the decision and therefore that the decision was not a

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[38] A legal proceeding is defined in 12 C.F.R. § 792.49 as "any matter before any federal, state or foreign administrative or judicial authority, including courts, agencies, commissions, boards or other tribunals, involving such proceedings as lawsuits, licensing matters, hearings, trials, discovery, investigations, mediation or arbitration."

[39] *Embarq Corp.*, 356 NLRB at 983.

[40] *Id.* (quoting *Dubuque Packing*, 303 NLRB at 392).

[41] *Id.*

mandatory subject of bargaining.[42] And if the employer initially refuses to provide the information on the ground that labor costs were not a factor in the relocation decision or the union could not have offered concessions sufficient to offset the employer's savings, the Board's later effort to deduce whether the union *would* have offered concessions is complicated and not "constructive for any of the parties involved."[43]

Under Member Liebman's proposed framework, an employer would be required to classify its contemplated relocation as either turning on labor costs or not.[44] If the relocation does not turn on labor costs, the employer would be required to explain the basis for its decision to the union.[45] If the contemplated relocation does turn on labor costs, the employer would be required to provide the union, upon request, with information about labor cost savings and, if the union fails to offer concessions, it would then be precluded from arguing to the Board that it could have made concessions.[46] But if the employer fails to honor the union's information requests, the employer would be precluded from arguing before the Board that the union could not have made sufficient concessions.[47] In addition to relieving the Board of an after-the-fact effort to ascertain whether a union could have offered sufficient labor concessions, Member Liebman argued that her proposed framework would encourage parties to share information and might lead to more constructive good-faith bargaining.[48]

The instant case is an appropriate vehicle for urging the Board to adopt Member Liebman's framework. Labor costs were clearly a factor in the Employer's decision, inasmuch as three-fourths of the Twinsburg branch's operating costs were composed of salary and benefits. Although the Employer has not yet argued that the Union could not have made sufficient labor-cost concessions to alter its decision to close the Twinsburg branch, the Employer will presumably make this argument before an Administrative Law Judge. At that point, the ALJ (and subsequently the Board) will be forced to play a guessing game as to whether or not the Union could have actually

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[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 984.

[47] *Id.*

[48] *Id.*

made such concessions. Had the Employer instead shared the information about its anticipated cost savings up front, the Union could have attempted to make concessions to offset those savings. The dispute could have been resolved through the collective-bargaining process rather than an after-the-fact inquiry by the Board.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer unlawfully failed to bargain over its decision to close its Twinsburg branch and unlawfully failed to bargain towards an accommodation to disclose the contents of the NCUA report. Moreover, the Region should use this case as a vehicle to urge the Board to adopt Member Liebman's concurring opinion in *Embarq Corp*.

/s/
B.J.K.

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cc: Injunction Litigation Branch